

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
August 19, 2014

v

STEVEN JOVAN NELSON,  
  
Defendant-Appellee.

No. 316624  
Jackson Circuit Court  
LC No. 12-004868-FH

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Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted<sup>1</sup> the trial court's May 20, 2013 order granting defendant's motion to suppress evidence in this case where defendant was charged with possession with intent to deliver cocaine less than 50 grams, MCL 333.7401(2)(a)(iv); and with possession of a firearm by a felon, MCL 750.224f. For the reasons set forth in this opinion we affirm in part, reverse in part, and remand for further proceedings.

**I. FACTUAL BACKGROUND**

On September 17, 2012, Detective Steven Temelko of the Michigan State Police received a telephone call from an informant who indicated that defendant was selling crack cocaine from his house. Temelko set up surveillance of defendant's house. Defendant left his house in his car, Temelko followed and stopped defendant's car.

While defendant was being pulled over, Officer Edward Smith of the Jackson Police Department, went to defendant's house. Smith went to defendant's front door and knocked, but no one answered, he then went to the back door of the house and knocked, again no one answered. While at the back door of defendant's house, Smith saw a trash can "at the northeast corner of the residence." The trash container was located next to a white pole that supported an extension of the roof. Although visible from the sidewalk, the container was 30 to 40 feet away

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<sup>1</sup> *People v Nelson*, unpublished order of the Court of Appeals, entered September 10, 2013 (Docket No. 316624).

from the sidewalk but no more than five or six feet from defendant's back door. The container was closed.

Smith opened the lid of the container and removed the trash bag on top. Smith set the trash bag on the ground and went through the bag's contents. Smith saw twelve clear plastic bags that were each missing one or two corners, and a clear plastic bag with a white residue. The residue tested positive for cocaine.

Smith turned the items obtained from defendant's trash over to Temelko and Temelko obtained a search warrant for defendant's residence. During execution of the warrant, police seized suspected cocaine, a firearm, a digital scale, and currency from the residence. Temelko subsequently interviewed defendant and defendant admitted ownership of the cocaine and scale, but he denied knowledge of the firearm.

On March 12, 2013, defendant moved to suppress evidence obtained from the trash container and from the residence. Defendant argued that Smith's search of the trash container violated the Fourth Amendment because the container was within the curtilage of his home. Defendant also argued that the search warrant was unlawful because, absent evidence from the trash container, there was no probable cause to support issuance of the warrant. Plaintiff argued that defendant did not have an expectation of privacy in his trash and therefore Smith's search of the container was proper.

The trial court granted defendant's motion and suppressed evidence from the trash container and evidence obtained during execution of the search warrant. Relying on *Florida v Jardines*, 569 US \_\_\_\_; 133 S Ct 1409; 185 L Ed 2d 495 (2013), the trial court held that the search violated the Fourth Amendment because the trash container was located within the curtilage of defendant's home and there was no exception that would apply to justify a warrantless search. On appeal, the prosecution argues that the trial court erred in holding that the search violated the Fourth Amendment and erred in applying the exclusionary rule.

## II. ANALYSIS

Whether a search violated the Fourth Amendment involves a question of constitutional law that we review de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). "A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221(2007).

### A. WARRANTLESS SEARCH

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004), quoting *Payton v New York*, 445 US 573, 586; 100 S Ct 1371; 63 L Ed 2d 639 (1980). The Fourth Amendment protections regarding a home, extend to the curtilage of a home. *United States v Dunn*, 480 US 294, 300; 107 S Ct 1134; 94 L Ed 2d 326 (1987).

The Fourth Amendment “establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the government obtains information by physically intruding on persons, houses, papers, or effects, a ‘search’ within the original meaning of the Fourth Amendment has undoubtedly occurred.” *Jardines*, 133 S Ct at 1414 (quotations and citations omitted). “By reason of our decision in [*Katz*]<sup>2</sup>, property rights are not the sole measure of Fourth Amendment violations . . . but though *Katz* may add to the baseline, it does not subtract anything from the Amendment’s protections when the Government does engage in [a] physical intrusion of a constitutionally protected area.” *Id.* (quotations omitted).

The trial court relied on *Jardines* in holding that Smith’s search violated the Fourth Amendment because it was performed within the curtilage of defendant’s home. In *Jardines*, police received a tip that marijuana was being grown in the defendant’s home. *Id.* at 1413. Police conducted surveillance of the defendant’s home for fifteen minutes and did not observe any activity. *Id.* A detective then approached the defendant’s home with a drug-sniffing canine. *Id.* The detective brought the dog to the defendant’s front porch where the dog made a positive alert for narcotics at the base of the front door. *Id.* On the basis of the dog’s alert, police obtained a search warrant and discovered drugs inside of the defendant’s home and the defendant moved to suppress the evidence, arguing that police conducted an unlawful search. *Id.*

The United States Supreme Court held that the police violated the Fourth Amendment. The Court noted that there was no question that the officers’ investigation occurred within the curtilage of the defendant’s home. *Id.* Because there was no exception to the warrant requirement, the reasonableness of the search turned on whether it was “accomplished through an unlicensed physical intrusion.” *Id.* While the general public, and thus in turn, the police, have license to “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,” *id.*, the scope of such implied license does extend to “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence. . . .” *Id.* The Court explained,

[I]ntroducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that* . . . . To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to--well, call the police. The scope of a license--express or implied--is limited not only to a particular area but also to a specific purpose . . . . Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search. [*Id.* at 1416 (emphasis in original).]

The Court rejected the prosecution’s argument that the subjective intent of the officers was irrelevant in determining whether police conducted an unreasonable search and seizure:

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<sup>2</sup> *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

Here, however, the question before the court is precisely whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. *Here, [police] behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.* [*Id.* at 1416-1417 (emphasis added).]

In this case, the prosecution and the concurrence argue that defendant's expectation of privacy in the trash container controls the outcome of this case irrespective of the container's location within the curtilage of defendant's home. This argument is unpersuasive. *Jardines* clearly holds that where police conduct a search in a constitutionally-protected area by means of an unlicensed physical intrusion, absent an exception, a Fourth Amendment violation will be found to have occurred. Additionally, in *United States v Jones*, \_\_\_ US \_\_\_, \_\_\_; 132 S Ct 945, 949; 181 L Ed 2d 911 (2012), the Supreme Court explained that:

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.

The Supreme Court in *Jones* recognized that it had deviated from the arguments set forth by the prosecution and adopted by the concurrence that focused exclusively on the property-based approach to the Fourth Amendment after *Katz* [which was decided in 1967] because the Court began to analyze whether government officers had violated a person's reasonable expectation of privacy. *Id.* \_\_\_ US at \_\_\_; 132 S Ct at 950. However, the Supreme Court in *Jones* held that *Katz* did not repudiate the understanding that the Fourth Amendment embodied "a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* \_\_\_ US at \_\_\_; 132 S Ct at 950. Accordingly, the Supreme Court concluded that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* \_\_\_ US at \_\_\_; 132 S Ct at 952. In *Jardines*, \_\_\_ US at \_\_\_; 133 S Ct at 1417, the Supreme Court reiterated its conclusion in *Jones*.<sup>3</sup> Accordingly, contrary to the arguments of the prosecution and the opinion set forth in the concurrence, once the trial court made a finding that the police had violated defendant's common-law trespassory rights, there was no need to separately inquire into whether the officer's conduct violated the defendant's expectation of privacy under *Katz*. *Id.* at 1417.

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<sup>3</sup> In the trial court's order, it relied on *Jardines*' reiteration of *Jones*' holding when it ruled that it was required to address whether defendant's trash can was located in the curtilage of defendant's house (Order, 2).

In this case, like in *Jardines*, police entered the curtilage of defendant's home. In *Dunn*, 480 US at 301, the Supreme Court provided four factors to consider when addressing whether an area should be considered curtilage:

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Here, the closed container was located a few feet from the back door of the residence. Specifically, although visible from the sidewalk outside defendant's residence, the trash container was 30 to 40 feet away from the sidewalk and was no more than five to six feet away from the back door. Thus, it was in close proximity to defendant's home. In addition, although the northeast corner of the home was visible from the street, it was partially enclosed from the rear and the roof extended over part of the area near the back door. Defendant had a fence at the rear of the back yard. Furthermore, the container was adjacent to a small patio area near defendant's home where a grill was located. The evidence therefore supports our finding that the container was located within the curtilage of defendant's home.

Moreover, the search of the container was unreasonable because Smith did not have a warrant, there were no exceptions that applied, and the search was accomplished "through an unlicensed physical intrusion." *Jardines*, 133 S Ct at 1415. In this case, Smith acted within the implied license enjoyed by the general public at large when he approached defendant's residence, walked onto his front porch, and knocked on his front door. Additionally, even assuming that walking around defendant's house, onto defendant's back porch, and knocking on the back door fell within the scope of the implied license, once Smith learned that nobody was home, the scope of the implied license did not extend to opening a closed trash container and rummaging through the container in search of contraband. "There is no customary invitation to do *that*." *Id.* at 1416 (emphasis in original). This is because the "background social norms that invite a visitor to the front door do not invite him there to conduct a search. . . ." *Id.*

The prosecution argues that *Jardines* requires not only a showing of a trespass by an officer, but also a showing of an unlawful purpose. The prosecution maintains that there was no evidence that Smith approached defendant's house with an unlawful purpose. However, the evidence proves that Smith waited until defendant left his residence and then waited until other officers effectuated a traffic stop of defendant before he proceeded to approach defendant's residence and knock on the door. When nobody answered, Smith walked around the house to the back door and again knocked, but did not receive a response. Smith then immediately began searching the trash container. Smith testified that he searched trash containers in backyards in several cases and he stated that it was permissible to conduct a "trash pull" behind a person's house under certain circumstances. Smith's testimony showed that he approached defendant's home when defendant was not there so that he could conduct a "trash pull." Like in *Jardines*, Smith's behavior "objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." *Id.* at 1417.

Having determined that the search of the trash container violated the Fourth Amendment, we now proceed to determine whether the trial court properly applied the exclusionary rule to the evidence found within the container.

“Generally, if evidence is seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial.” *People v Barbarich (On Remand)*, 291 Mich App 468, 473; 807 NW2d 56 (2011). However, the exclusionary rule does not act as a per se bar to the admission of unlawfully obtained evidence; instead,

To trigger the exclusionary rule, police conduct must be *sufficiently deliberate* that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances *recurring or systemic negligence*. [*Herring v United States*, 555 US 135, 144; 129 S Ct 695; 172 L Ed 2d 496 (2009) (emphasis added).]

In this case, though the evidence supported that Smith engaged in a deliberate effort to conduct a trash-pull at defendant’s residence and that this conduct was part of a recurring pattern employed by Smith, it is also true that the status of the law relative to Smith’s actions were in a state of flux. Because this Court need not reach a finding on this issue in order to resolve this matter, we assume, without deciding that for purposes of this appeal application of the exclusionary rule was proper. Thus, for purposes of our analysis of this case, we assume, without deciding, that application of the exclusionary rule was applicable in this case.

## B. VALIDITY OF THE SEARCH WARRANT

Though not raised by the prosecution, we must next examine whether, independent of the unlawfully seized evidence, probable cause existed for the issuance of the warrant. The trial court excluded evidence police obtained from defendant’s residence during execution of the search warrant. In doing so, the trial court necessarily held that, absent the unlawfully seized evidence from the trash container, there was no probable cause to support issuance of the warrant.

“The exclusionary rule applies not only to evidence improperly seized during a search without a warrant, but to evidence subsequently seized pursuant to a warrant obtained as a result of an initial illegal search.” *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). “Probable cause exists . . . if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place.” *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (quotations omitted). When a confidential informant provided information to the affiant, the affidavit “must contain ‘affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.’” MCL 780.653(b). However, “[a] warrant may issue on probable cause if the police have conducted an independent investigation to confirm the

accuracy and reliability of the information regardless of the knowledge and reliability of the source.” *People v Waclawski*, 286 Mich App 634, 699; 780 NW2d 321(2009).

Here, absent the evidence from the trash container, Temelko’s affidavit in support of the search warrant contained the following relevant information: On September 17, 2012, an anonymous informant told Temelko that defendant had received a large amount of cocaine on September 17, 2012 and was selling the cocaine at 310 E. Euclid Ave in Jackson. The informant also told Temelko defendant’s name, where defendant lived, that defendant had two vehicles: a red Cadillac and a silver Corvette, and that defendant’s vehicles were located at defendant’s house on September 17, 2012. Temelko averred that he was familiar with defendant’s name from prior narcotics investigations he worked on with the Jackson Narcotics Enforcement Team (JNET). Temelko performed an independent investigation that verified several of the statements the informant made. Temelko was aware from past investigations that defendant drove a red Cadillac and a silver Corvette. Temelko observed two vehicles that matched this description at 310 E. Euclid. Temelko averred that officers conducted surveillance of 310 E. Euclid and observed the red vehicle leave the residence. Officers then effectuated a traffic stop of the vehicle and defendant was the person driving the vehicle. Temelko averred that defendant denied having just left 310 E. Euclid even after Temelko informed defendant that officers watched him leave the residence.

The details provided by the informant regarding when defendant received the cocaine, defendant’s name and address, defendant’s vehicles, and the location of defendant’s vehicles all permit an inference that the informant spoke from personal knowledge. Also, Temelko’s independent investigation confirmed that the informant accurately stated defendant’s name, defendant’s location, defendant’s vehicles, and the location of defendant’s vehicles. In addition, Temelko was familiar with defendant’s name from prior narcotics investigations.

However, all of the information provided by the unnamed informant that was verified by the police was information that any neighbor, acquiesce, or casual observer would possess. But when police stopped defendant, he specifically denied that he had just left his residence. This was in direct contrast to what the police officers averred they observed. This statement supported an inference of defendant’s consciousness of guilt with respect to the house in that it lent credence to the informant’s allegation that defendant was conducting criminal activity at the house. See, *People v Unger*, 278 Mich App 210, 227; 759 NW2d 272 (2008). Viewed in totality, absent the information concerning the trash container, the information in the affidavit provided a substantial basis to support a fair probability that cocaine or other evidence or contraband would be found at defendant’s residence. *Kazmierczak*, 461 Mich at 417-418. Accordingly, even absent the unlawfully obtained evidence, there was probable cause to issue the search warrant and the trial court erred in concluding otherwise and erred in excluding evidence obtained during execution of the warrant. *Jordan*, 187 Mich App at 588.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray  
/s/ Stephen L. Borrello